

FILED

MAR 14 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PHILLIP JAMES CHILLEMI,

Defendant - Appellant.

No. 04-10464

D.C. No. CR-03-00917-PGR

MEMORANDUM^{*}

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PHILLIP JAMES CHILLEMI,

Defendant - Appellant.

No. 04-10465

D.C. No. CR-97-00199-PGR

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted March 8, 2006 **

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Phillip James Chillemi appeals from his 240-month sentence and jury-trial conviction for bank robbery, in violation of 18 U.S.C. § 2113(a), and the revocation of his supervised release, resulting in a 24-month sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's judgment in 04-10464, and grant counsel's motion to withdraw and affirm in 04-10465.

In 04-10464, Chillemi contends that (1) his right to due process was violated because the government did not prove that he robbed the bank by intimidation as required; (2) the district court erred in admitting opinion testimony of a lay person in violation of Federal Rules of Evidence ("FRE") 701 and 403; (3) the district court erred in denying his *Faretta* request to represent himself; and (4) he should receive a limited remand under *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

First, because caselaw is clear that express threats or threatening movements are not required to demonstrate "intimidation," we reject Chillemi's contention

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

that the government failed to prove this element of bank robbery. *See United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983).

Second, based on the totality of the circumstances, the district court did not abuse its discretion when it admitted Detective Van Meter's testimony regarding the identity of appellant as the bank robber. *See United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005) (laying out four-factor test to determine substantial and sustained contacts pursuant to FRE 701). Further, Van Meter's testimony's probative value outweighed any prejudicial effect resulting in no violation of FRE 403. *See United States v. Henderson*, 68 F.3d 323, 327-28 (9th Cir. 1995).

Third, the district court did not err in denying appellant's request to represent himself, finding that such requests were delaying tactics. *See United States v. Flewitt*, 874 F.2d 669, 675 (9th Cir. 1989) (noting that if the "request [to proceed pro se] is part of a pattern of dilatory activity, the court has the discretion to deny the continuance and require the defendant to proceed to trial on the scheduled date either with the counsel designated or pro se"); *see also Jackson v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990) (holding the request to represent oneself to be untimely because it was made only after a motion for substitute counsel and new trial was denied).

Fourth, we reject appellant's request for a limited remand as unnecessary.

See Ameline, 409 F.3d at 1083 (“the limited remand is invoked only when it cannot be determined from the record whether the judge would have imposed a materially different sentence had he known that the Guidelines were advisory rather than mandatory”).

In 04-10465, pursuant to *Anders v. California*, 386 U.S. 738 (1967), counsel for Chillemi has filed a brief stating there are no grounds for relief, and a motion to withdraw as counsel of record. Chillemi has not filed a pro se supplemental brief.

Our independent review of the record, pursuant to *Penson v. Ohio*, 488 U.S. 75, 83 (1988), discloses no grounds for relief.

In 04-10464, the district court’s judgment is **AFFIRMED**.

In 04-10465, counsel’s motion to withdraw is **GRANTED** and the district court’s judgment is **AFFIRMED**.